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In the

Supreme Court of the United States

No. 170 October Term, 1949

Park-In Theatres, Inc.
plaintiff-petitioner

v.

Loew's Drive-In Theatres, Inc.
defendant-respondent

Petition for Re-Hearing under Rule 33(2) of Order of October 10, 1949 denying Petition (filed July 6, 1949) for Writ of Certiorari

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Press of Allen, Lane & Scott, Philadelphia.

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Petition for Re-Hearing

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Park-In Theatres, Inc., respectfully petitions for a re-hearing on its Petition (filed on July 6, 1949) for Writ of Certiorari to review the decision[1] and judgment[2] of the United States Court of Appeals for the First Circuit rendered in the above-entitled case on April 8, 1949, and for a re-hearing in respect to this Court's Order of October 10, 1949 denying the aforesaid Petition for Writ of Certiorari;—to the end that such Writ of Certiorari may be granted (and to the end that the decision of the Court of Appeals may be reversed and the judgment of the trial court reinstated).

On October 21, 1949 this Court entered an Order extending to November 9, 1949, petitioner's time for filing Petition for Re-Hearing.

In support of its present Petition for Re-Hearing, petitioner relies, inter alia, upon the Affidavits of Guy W. Meek[3], R. A. Edmondson, Jr.[4], Willis Warren Smith[5] and Robert McCay Green[5], and the Exhibits referred to in said Smith and Green Affidavits;—said Affidavits and said Exhibits being contained in the printed *Appendix* hereto (filed simultaneously with this Petition). The pages of the *Appendix*, which contain the affidavits, are numbered 1a to 27a, inclusive. The exhibits follow the affidavits, in the *Appendix*, in the order of their exhibit numbers.

For the convenience of Court and counsel, we have also reproduced, at the end of this petition, excerpts from the Trade (and other) Publications which are Exhibits 1 to 29, inclusive;—the pages containing these *exhibit-excerpts* being numbered consecutively from 1e to 16e, inclusive.

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[1] R. pp. 767-780 and 174 F. 2d 547

[2] R. pp. 782

[3] dated October 31, 1949

[4] dated November 1, 1949

[5] dated November 8, 1949

Counsel's Certificate under Rule 33(2)

The undersigned, counsel for petitioner, hereby certify that the within petition for re-hearing is presented in good faith and not for purposes of delay and that the petition is limited to grounds which are confined either to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner although not previously presented.

(signed) DOUGLAS W. MCGREGOR

(signed) LEONARD L. KALISH
counsel for petitioner

Grounds for Petition for Re-Hearing

The following are the grounds of this petition for re-hearing:

1) The resolution of the questions presented by the Petition for Writ of Certiorari will be of immediate importance to and of substantial and controlling effect upon an entire large industry founded upon the patent here in suit, and such importance and effect goes far beyond the interests of the parties involved in the case at bar.

2) The resolution of the questions presented by the Petition for Writ of Certiorari will be a great convenience and economy to the many *Federal Courts* which are and will be involved in further extensive litigation based upon the patent here in suit as well as upon licenses under such patent, in the score of now-pending suits and in several hundred* more suits which will inevitably have to be filed on this patent and on the licenses thereunder unless this Court resolves the questions presented by the Petition for Writ of Certiorari in the case at bar.

3) The resolution of the questions presented by the Petition for Writ of Certiorari will be a great convenience

* see Smith affidavit at 14a & 15a

and economy to many other litigants and prospective litigants not parties to the case at bar and will eliminate a substantial amount of confusion and uncertainty existing at the present time in the *drive-in theatre industry* because of the two extant circuit decisions[6] on the patent here in suit, which the industry and accredited representatives and legal counsel for various segments of the industry have conflictingly interpreted (*which further litigation, confusion, uncertainty and conflict will be eliminated by the resolution of the questions presented by the Petition for Writ of Certiorari).*

4) A very large and rapidly expanding industry founded upon the patent here in suit

(which industry has either paid royalties under the patent in suit or has set aside contingent reserves for such royalties)

has looked to the case at bar as the test case for the industry as a whole, and the case at bar has in effect and for all practical purposes been tantamount to *a class action.*

5) Accredited representatives and legal counsel for substantial segments of the motion picture industry have *misused* this Court's denial (on October 10, 1949) of the petition for writ of certiorari in the case at bar.

Authorities relied upon by Petitioner in Support of its Grounds of the Petition for Re-Hearing

Chief Justice Vinson's address before the Assembly of the American Bar Association on September 7, 1949 at St. Louis, Mo., which address was published, inter alia, in the September 19, 1949 issue of *The Legal Intelligencer* (Philadelphia) Vol. CXXI (No. 55), page 291 (quoted on following page 10 of the within Petition).

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[6] *Park-In Theatres, Inc.* v. *M. A. Rogers et al* (decided Sept. 14, 1942) 130 F. 2d 745 (CA-9)

Loew's Drive-In Theatres, Inc. v. *Park-In Theatres, Inc.* (decided April) 8, 1949) 174 F. 2d 547 (CA-1)

Robertson & Kirkham's Jurisdiction of the Supreme Court of the United States:

Section 320, note 71: *the question involved in the case at bar is involved in numerous cases pending in lower Federal Courts*

Section 322, notes 23 & 24: *nineteen other cases are already pending involving the same question and several hundred others must be filed in the near future if certiorari is denied*

Section 324, note 72: *this Court's denial (on October 10, 1949) of the Petition for Writ of Certiorari in the case at bar has been widely misused*[7]

Section 287, note 29 and Section 288, note 70 *intervening*[8] *events have imported into the case an element of importance not exhibited in the original Petition*

and the following decisions of this Court cited in the aforeentioned notes:

71. *Meyer* v. *Kenmore*, 297 U.S. 160; 80 L.Ed. 557; *St. Louis Can Co.* v. *General Life Ins. Co.*, 296 U.S. 660; 80 L.Ed.;
Callaghan v. *R.F.C.*, 297 U.S. 464; 80 L.Ed. 804;

23. *Bowers* v. *Lawyers' Mortgage Co.*, 285 U.S. 182; 76 L.Ed. 690;

24. *Bingham* v. *United States*, 296 U.S. 211; 80 L.Ed. 160;
Industrial Trust Co. v. *United States*, 296 U.S. 220; 80 L.Ed. 191;

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[7] in violation of this Court's firmly established rule that neither the granting nor the denial of a petition for writ of certiorari is to be construed as any expression of opinion, by this Court, upon the merits of the controversy: *United States* v. *Carver*, 260 U. S. 482, 490, 67 L.Ed. 361, 364, *House* v. *Mayo*, 32 U. S. 42, 48, 89 L.Ed. 739, 743, *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 258, 60 L.Ed. 629, 633, *Ohio ex rel Seney* v. *Swift & Co.*, 260 U. S. 146, 151, 67 L.Ed. 176, 179, *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401, 403, 404, 75 L.Ed. 1142, 1143

[8] i. e. a) intervening the decision of the First Circuit and the denial of certiorari, and b) intervening the denial of certiorari and filing of the within Petition for Re-Hearing

72. *Carbice Corp. of America* v. *American Patents Development Corp.*, 283 U.S. 420; 75 L.Ed. 1153;

29. *Paramount Publix Corp.* v. *American Tri-Ergon* & *Corp.*, 293 U.S. 528; 79 L.Ed. 638;

70. *Group No. 1 Oil Corp.* v. *Bass*, 282 U.S. 830; 75 L.Ed. 739.

Matters submitted in support of the Grounds of the Petition for Re-Hearing

In support of the foregoing grounds, petitioner respectfully shows the following, by the affidavits and exhibits in the *Appendix* hereto:

The industry as a whole has recognized and acknowledged that Hollingshead's drive-in theatre of the patent here in suit is the first drive-in theater ever known or built anywhere in the world[9] and that the industry was brought into being and was founded upon Hollingshead's drive-in theatre and upon the patent here in suit covering such drive-in theatre.

The patent here in suit is the first patent ever issued by the United States Patent Office (or by the patent office of any other country) on a drive-in theatre.[10]

While the wider adoption of the invention on the patent here in suit was impeded first by general skepticism as to the practicability of the invention[10] and by the discriminatory film-distributing practices[11] of the film producers and film distributors, and only about 100 or so drive-in theatres had been built from 1933 to the beginning of the war or the end of 1941[12], and while the growth

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[9] see Lowell Thomas' radio broadcast of May 19, 1933 reproduced at page 82 of the printed *Transcript of Record*, and see also statements to like effect on *exhibit-excerpt* pages 1e, 3e, 4e, 5e, & 13e, referring to Hollingshead's Camden drive-in theatre, built in 1933

[10] R. pp. 62-64, 75-77, 83, 121-3, 521-3, 525-7

[11] discriminatory film distributing practices leveled at drive-in theatres: 15a, 16a & 19a, and Exhibit 2 at 2e and Exhibit 12 at 6e

[12] only about 100 drive-in theatres built up to about beginning of the war: 19a and Exhibit 1 at 1e and Exhibit 4 at 2e and Exhibit 11 at 6e

of the drive-in theatre industry was brought virtually to a standstill by the war-imposed curtailments[13], yet since the end of the war approximately 1000 drive-in theatres have been built[14] and put into operation and many more are presently being built[15], and the drive-in theatre industry, founded upon the patent here in suit, has grown to substantial proportions, with an estimated investment[16] of over 150 million dollars, with *sixty million dollars* being spent in 1948, alone[17].

The industry has recognized the patent here in suit by entering into well over 100 license agreements[18] with petitioner and by paying royalties[18] to petitioner for the use of the invention of the patent in suit, the use of which invention has been exceptionally profitable [19] to the owners and operators of drive-in theatres, and the drive-in theatre has become a new, major and distinct[20] branch of the motion picture exhibition field, both from the public standpoint as well as from the standpoint of film producers and exhibitors.

The industry as a whole are looking to a final determination of the validity of the patent here in suit, by this Court, in the case at bar[21], and both the unlicensed and

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[13] drive-in theatre expansion also curtailed by war: 19a and Exhibit 2 at 1e

[14] 1000 drive-in theatres since war: 3a, 8a, 17a & 19a and Exhibit 2 to 7 at 2e to 4e and Exhibit 11 at 6e

[15] many more drive-in theatres now being built: 7a & 8a and Exhibits 1 to 11 at 1e to 6e and Exhibit 19 at 11e

[16] $150,000,000.00 invested in drive-in theatres: 3a, 7a & 20a

[17] $60,000,000.00 spent on drive-in theatres in 1948 alone: Exhibit 1 at 1e

[18] over 100 licensees paid royalty: 1a, 2a, 4a, 5a, 7a & 18a and Exhibit 5 at 3e, Exhibit 16 at 9e, Exhibit 24 at 13e, Exhibit 25 at 14e, Exhibit 28 at 15e and Exhibit 29 at 16e and Exhibits 30 to 44, inclusive

[19] drive-in theatres exceptionally profitable to licensees and to infringers: 3a, 16a & 17a, and Exhibits 1 to 11 at 1e to 6e

[20] drive-in theatres have become distinct and new kind of motion-picture exhibition: Exhibit 2 at 1e (last 2 lines) and Exhibits 7 to 9 at 4e & 5e

[21] industry is looking to this Court's decision in case at bar, on the merits: 3a to 5a, 8a & 9a, 14a, 19a, 21a, 22a & 27a, and Exhibits 14 to 29 at 7e to 16e, and Exhibits 30 to 44

infringing users of the invention as well as the licensed users of the invention, comprising in the neighborhood of 1000 or more such drive-in theatres, are looking to this Court's determination of the validity of the patent in the case at bar.

The unlicensed part of the industry will abide by this Court's decision on the merits and settle (at the established royalty rate) for the unlicensed use of the invention of this patent, if the patent is sustained by this Court[22] (as it was by the trial court).

The licensed part of the industry will likewise pay up all royalties now being withheld (pending this Court's decision on the merits of this patent), if this Court grants certiorari in the case at bar and sustains the patent here in suit upon hearing on the merits[23].

Petitioner will discontinue all of the extensive now-pending patent-litigation and will not institute any of the hundreds of additional patent-infringement suits (which are now necessary if certiorari is not granted), if upon the granting of certiorari this Court should hold the patent invalid, upon the hearing on the merits.

Large sums of royalties are being escrowed or otherwise put into contingent reserves both by licensed users of the invention as well as by unlicensed users of the invention, and tax-reductions are being made for such royalties unpaid but in reserve or escrowed[24].

In addition to the score of now-pending patent-infringement suits[25] 500 or more patent-infringement suits will have to be instituted if this Court does not grant certiorari in the case at bar, in order to stay the running

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[22] unlicensed part of industry willing to settle for use of invention if patent sustained by this Court in case at bar: 5a, 8a-9a, 19a, 23a and 27a (see particularly *footnote* on page 27a)

[23] licensed part of industry willing to pay up all royalties if patent sustained by this Court in case at bar: 4a-5a, 8a-9a, 18a, 19a & 23a, and Exhibits 30 to 44

[24] industry has escrowed or otherwise put in contingent reserve funds, and has taken tax reductions for monies equivalent to established royalties: 4a & 20a, and Exhibit 25 at 14e, and Exhibits 30 to 36, and Exhibits 38 to 40

[25] other now-pending suits: Exhibits 45 & 46

of the statute of limitations, pending the decision of another circuit upon the same patent[26].

In addition, about 100 suits for royalties will have to be instituted, against licensees who have withheld royalty payments pending determination of the validity of the patent here in suit by this Court in the case at bar[27].

Likewise, further additional litigation will likely result upon the claims of certain licensees for a refund of royalties heretofore paid by them[28].

This vast litigation, which would undoubtedly occupy the time of many Federal Courts throughout the country for many years to come, will be eliminated by the determination, by this Court, of the validity of the patent here in suit, in the case at bar, both because the industry and petitioner will abide by this Court's decision.

Thus, if this Court, in the case at bar, holds the patent valid, the industry will willingly pay for both the licensed[23] and unlicensed[22] use of the invention at the established royalty rate, without further litigation. If, on the other hand, this Court holds the patent invalid, in the case at bar, petitioner will withdraw all now-pending patent-infringement suits and will not institute any other patent-infringement suits.

Furthermore, this Court's denial (on October 10, 1949) of the Petition for Writ of Certiorari, in the case at bar, has been misinterpreted and misused by accredited representatives of the industry by statements in the principal trade publications that such denial of certiorari

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[22] unlicensed part of industry willing to settle for use of invention if patent sustained by this Court in case at bar: 5a, 8a-9a, 19a, 23a and 27a (see particularly *footnote* on page 27a)

[23] licensed part of industry willing to pay up all royalties if patent sustained by this Court in case at bar: 4a-5a, 8a-9a, 18a, 19a & 23a, and Exhibits 30 to 44

[26] about 500 additional patent infringement suits will have to be instituted if certiorari is not granted: 14a-15a and 25a-27a

[27] about 100 royalty-collection suits (under licenses) will have to be instituted if certiorari is not granted: 15a and 25a-27a

[28] suits based on royalty-refund claims of ex-licensees will likely result if certiorari is not granted: 22a and Exhibits 30, 32, 35 & 43

represents this Court's holding that the Hollingshead patent is invalid,[29] and that all infringers are thereby relieved of further liability[30] and that licensees are relieved of further royalty payments.[31]

The decision of the U. S. Court of Appeals in the 1st Circuit, in the case at bar, as to which certiorari is sought has also been interpreted by accredited representatives of the industry as being in conflict with the decision of the Court of Appeals for the 9th Circuit on the same patent[32].

The circumstances set forth in the two immediately preceding paragraphs created wide spread confusion[33] and uncertainty[33] in the industry.

Therefore, the resolution, by this Court (in the case at bar), of the questions presented by the Petition for Writ of Certiorari, is of immediate importance and of substantial and controlling effect upon an entire large industry founded upon this patent, and the importance and effect of the resolution of these questions, by this Court, goes far beyond the interest of the parties involved in the case at bar, and is of interest and importance to the owners and operators of a thousand or more drive-in theatres distributed over the entire United States.

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[29] this Court's *order* of 10-10-49 has been widely misused by representations that such *order* affirms the decision of the 1st Circuit and is this Court's decision that Hollingshead patent is invalid: Exhibits 24 to 29 at 13e to 16e, and Exhibits 43 & 44

[30] This Court's *order* of 10-10-49 has been widely misused by representations that such *order* relieves all other infringers of liability: Exhibits 24 to 29 at 13e to 16e, and Exhibits 43 & 44

[31] This Court's *order* of 10-10-49 has been widely misused by representations that such *order* relieves all licensees of royalty payments: Exhibits 24 to 29 at 13e to 16e, and Exhibits 43 & 44

[32] accredited representatives of the industry have interpreted the 1st Circuit's decision in the case at bar as being in conflict with the decision of the Court of Appeals for the 9th Circuit on the same patent in *Park-In* v. *Rogers*, 130 F.2d 745: Exhibit 18 at 10e & 11e, Exhibit 22 at 12e, Exhibit 25 at 14e (middle of page 14e), and Exhibits 30, 35 & 40

[33] the decision of the First Circuit has created confusion in the industry in view of the earlier decision of the 9th Circuit (in *Park-In* v. *Rogers*, 130 F.2d 745) on the same patent: 3a-4a and 8a, and Exhibit 5 at 3e, and 22 to 29 at 12e to 16e and Exhibits 30 to 44

The case at bar is therefore most conspicuously one

> "which presents questions whose resolution will have immediate impotrance far beyond the particular facts and parties involved",[34]

and that, *in a sense*,[34] the case at bar is *a class action*[34]

> "upon the outcome of which are based the plans . . . of a great many people throughout the country"[34]

and the case at bar is one in which the disputed decision of the First Circuit has

> "consequences for other litigants in other situations"[34]

Thus, the resolution, by this Court (in the case at bar) of the questions presented by the Petition for Writ of Certiorari will be a great economy of both time and money to many litigants and prospective litigants and to the many Federal Courts which would otherwise inevitably be involved in many more years of litigation.

Conclusion

Wherefore, petitioner prays for a re-hearing on its Petition for Writ of Certiorari and in respect to this Court's denial (on October 10, 1949) for Petition for Writ of Certiorari;—to the end that this Court may grant such Petition for Writ of Certiorari.[35]

DOUGLAS W. MCGREGOR
LEONARD L. KALISH
MELVIN R. JENNEY
THOMAS J. FLYNN

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[34] *Chief Justice Vinson's* recent *address before* the Assembly of *the American Bar Association*, on *September 7, 1949*, at St. Louis, which address was published, inter alia, in the September 19, 1949 issue of *The Legal Intelligencer* (Philadelphia) Vol. CXXI (No. 55), page 291.

[35] and to the end that upon the hearing on the merits of the case, this Court may reverse the decision of the Court of Appeals for the First Circuit and thereby reinstate the decision of the trial court in the case at bar which held the patent valid and infringed upon an extensive trial (*Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271*).

Reflecting growth and public importance of drive-in theatres

Exhibit 1 (May 16, 1948) **Philadelphia Inquirer** (page 17)

"Growth of Drive-In Movies"

"By the end of the year (1948) there will be 720 drive-ins in operation from coast to coast. At least 12 additional outdoor theatres will open in the Pittsburgh area this summer, giving that section a total of 29 drive-ins. New York City got its first drive-in a few weeks ago, a $300,000 establishment on Staten Island. Six have opened in Dayton, Ohio alone, and six are scheduled to open in St. Louis. **Building costs for the** mushrooming **industry are placed at $60,000,000 for 1948.**"

"Principal factor in this combination of motoring and motion pictures has been the appeal of the drive-in theater to those who otherwise would not be able to attend motion pictures regularly."

"**First known** installation of a **drive-in theater** was made **in 1933** near the **Camden** Airport. By 1940, about 100 . . . were in operation throughout the nation. The war halted expansion, but the boom is on in earnest now. . . . **The Independent Drive-In Theater Owners Association** . . . at Austin, Texas . . . **(supplies) members,** wherever located **(with) information on . . . patent suits** and other data. Also, the organization **will assist in establishing new outdoor theaters.**"

"To date, the most expensive theater of this type is the Rancho, at San Diego, Calif. It cost in excess of $450,000."

Exhibit 2 (August 17, 1948) **Motion Picture Herald** (pages 13 & 16)

"The Roof's the Sky and Sky is Drive-In Limit"

"The Drive-In Theatre, the screen's institution of the far-flung crossroads of the nation, impeded by war economy, is hastening to catch up . . ."

". . . a growing source of revenue for the (film) distributors . . ."

Reflecting growth and public importance of drive-in theatres (continued)

. . . **drive-ins are doing outstanding business and, in many cases, have recouped their investment in the first year of operation** . . ."

"Drive-in operators believe that the year 1949 will find them hitting their full stride . . ."

". . . drive-ins are making money, but they want better product and better runs. At the same time, they are hesitant to pay for pictures on a percentage basis. The argument is likely to come to a boiling-point next year when the number of drive-ins operating may reach 900 or 1,000. At this point, the sales heads of the **distributors are determined** not to let outdoor theatres interfere seriously with established houses and **to treat them as subsequent-run houses.**"

Exhibit 3 (July 17, 1948) **BOXOFFICE** (pages 10 & 11)

"50 Drive-Ins at Pittsburgh, As Outdoor Theatres Boom"

"Cleveland and Pitt Areas have 100 Open Airers . . ."

". . . almost without warning, the drive-ins started popping up through the area. . ."

"Most of the drive-ins are owned by . . . enterprising businessmen who viewed the . . . idea as a means of obtaining good returns on an investment. . . ."

"However, there are many established exhibitors in the field. . . A number of these exhibitors are in partnership with drive-in operators or are directors of drive-in corporations."

Exhibit 4 (November 13, 1948) **BOXOFFICE** (page 25)

"Drive-Ins up From 100 to 761 in 20-Month Building Boom"

"Open at rate of More than One Per Day, According to Survey by MPAA"

"More than six times as many drive-in theatres were built in the 20 months ending September 1, this year, than during the previous 14 years. The total leaped from 100

Reflecting growth and public importance of drive-in theatres (continued)

to 761, an increase of 641, at the rate of about 32 a month. This is more than one a day."

"The first drive-in was opened near Camden, N. J. in 1933."

. . . . . .

"Then there is the matter of **audience potential.** On the basis of the generally accepted average of three persons to a car attending a drive-in show, these outdoor playhouses with all car spaces full **accommodate 943,134 persons,** or about one out of every 148 persons in the nation. Most of them put on two shows a night."

Exhibit 5 (June 11, 1949) **BOXOFFICE** (page 12)

"Men and Events" . . .

"Drive-Ins Booming"

"Drive-Ins are popping up so fast the statisticians can't keep up with them. They now estimate that about 1,000 will be in operation before the summer is over."

"There is still some **doubt about the paying of royalties under the patent held by a New Jersey firm,** but this problem will be solved for the future by the expiration of the patent this year. No move has been made as yet to take an appeal to the Supreme Court from the circuit court decision in Boston ruling the patent invalid."

Exhibit 6 (June 11, 1949) **Motion Picture Herald** (cover & page 15)

"Bigger and Better Drive-ins Boom"

"Motor-Movies Weaving New Spell for Patron"

"Bigger, More Elaborate Operations Rise at all Nation's Crossroads"

"The drive-ins are flourishing once again. Just as last year at this time, when there were only about 500 operating, the auto theatres are reportedly **doing capacity business** and getting increasingly better runs from the distributors. **Every week new drive-ins are opening all over the country** and plans for additional ones are announced."

4e Excerpts from trade (and other) publications

Reflecting growth and public importance of drive-in theatres (continued)

Exhibit 7 (June 20, 1949) **TIME** (page 84)

"**Within the year,** U.S. **drive-in theaters** had **doubled; more than 1,000** sprawled under the sky **in 45 states,** and, **with at least 100 more on the way,** the sky seemed to be the limit. Last week, while indoor exhibitors gloomed over a 20% drop from last year's box-office take, Variety reported a 10% boost in drive-in business."

"**From their modest start in Camden (N.J.) in 1933, the drive-ins have grown too big** to be dampened by rain."

"One outdoor impresario estimates that 80% of drive-in fans are not, and never have been, regular indoor movie-goers. The best customers are 1) moderate-income families who bring the children to save on baby-sitting, 2) the aged and physically handicapped and 3) farmers and factory workers ducking the ritual of dressing up to go to a movie in town."

Exhibit 8 (July 23, 1949) **BOXOFFICE** (page 42)

"Rodgers Says Drive-In Creating New Patrons"

"New York-Drive-ins have become such an important factor in developing new customers for theatres and in returning old ones who for various reasons have not been attending often that **MGM** is now making a national survey of the open-air operations, says William F. Rodgers, vice-president and general sales manager.

"'As a result of the survey,' he said, 'we hope to find out just how much competition they are to established theatres. There are now about 1,000 of the open-air spots. Certainly in the drive-in we have a new type of business. Many owning both theatres and drive-ins in close proximity to each other contend that the drive-in is not competition, that a new motion picture clientele is being formed attracting folks who were not regular attendants to theatres. I believe this is true'."

"The fact that so many of our customers who for years have operated theatres are also in the drive-in business, should enable the industry to find their proper place."

Reflecting growth and public importance of drive-in theatres (continued)

Exhibit 9 (July 30, 1949) **The Independent Film Journal** (page 3)

"Drive-Ins Create New Patrons for Motion Pictures—Rodgers"

"Drive-ins are creating new patrons for motion pictures, William F. Rodgers, vice-president and general sales manager for M-G-M, told the industry trade press last week. While no final conclusions can yet be drawn from a survey made by the company on this subject, the M-G-M sales chief stated that there was considerable evidence to indicate that **this 'new type of business' was expanding the national audience** rather than serving as a competitive threat to established theatres."

"Concluding his remarks, Rodgers said, 'If they are **catering to people who seldom went to theatres, . . . we should give them every encouragement as another department of motion picture service.'"**

Exhibit 10 (August 24, 1949) **The Exhibitor** (page 5)

"Big story of the 1949 entertainment season has been the growth of drive-in throughout the country."

"In all parts of the U. S., they have sprung up as a permanent part of exhibition, bringing, in the opinion of many, new theatregoers who ordinarily would never go to the regular type of theatre."

". . . **Camden, N. J., where the drive-in originated,** . . ."

Exhibit 11 (October 1, 1947) **The New Yorker** (page 20)

"The Talk of the Town":

"Drive-In movie theatres have been springing up all over the country for the last year or so, . . . now New York has a **rather spectacular** one. It's the **Whitestone**

Bridge Drive-In Theatre . . . the manager, Mr. Harvey Elliott, . . . takes a bullish view of the future . . . 'Let me tell you the drive-in theatre is no fad. . . . The drive-in is the easiest way there is to see a movie . . . **family trade . . . accounts for eighty-six per cent of our business . . .**'"

"The South, Southwest, and Midwest have the greatest number per capital . . . **The first drive-in theatre was built in 1933, outside Camden, New Jersey, he told us, by a man named Hollingshead, who got a patent on it** and has been suing other drive-in-theatre people ever since. . . . There were only a hundred drive-ins in the whole country in 1940; now there are fifteen hundred, and two thousand under construction. . . . **The Whitestone . . . cost . . . about four hundred thousand dollars. . . .**"

". . . The cars line up on ramps laid out in a series of semicircles around the screen. **The ramps slant upward at an angle.** . . . 'On opening night, we turned away eight thousand people,' Elliott said. 'Since then, we've averaged sixty per cent of capacity. . . .'"

Exhibit 12 (October 8, 1949) **BOXOFFICE** (page 10)

"Drive-In Clearance Rights Placed Before the Court"

"Chicago—the first drive-in theatre suit attacking film distribution practices . . . got under way in federal court here this week."

"The South Bend operators are attempting to introduce the court's opinions in the Paramount antitrust case,* to bolster their charge that there has been a disregard of tests laid down by the court to determine the reasonableness of clearance."

. . . . . .

"The defense also told the court that drive-in theatres are so new to the industry . . ."

"The newness of the drive-in, Miles Seeley, attorney for RKO, Loew's and Universal-International, said, 'has not only posed a question for the distributor as to how they should be treated.' . . ."

*U. S. *v.* Paramount Pictures Inc. et al., 334 U. S. 131.

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts

Exhibit 13 (August 28, 1948) **The Charlotte (N. C.) News** (page 7-A)

Drive-In Men May Form Association"

"**At least 150 operators of drive-in theaters of the Carolinas** will meet here tomorrow to discuss formation of an association.

"Bob Jeffress . . . said that the purpose of the organization will be to protect the interests of theater operators. He explained that hundreds of drive-in theaters have been opened in the United States during the past few months and that an organization is needed to protect their interests. There are at least 128 drive-ins in the Carolinas now . . . three committees, policy, legislative and **litigation** have been formed."

"The meeting here tomorrow has attracted **national** interest. Representatives of interested groups in other states are expected to attend the meeting and it is believed that the Carolinas Association may be the nucleus of a **national** group."

Exhibit 14 (October 25, 1948) **Bulletin No. 4** of the

Drive-In Theatre Owners Association, Inc.

"This is the important bulletin that **you have been waiting for.** It has all the **information** we think you wish **in connection** with the **litigation** . . . **the Hollingshead** (Park-In) **patent** . . . **effect on drive-in theatre operators.**"

"A **meeting** was called for the Board of Directors . . . in order that they might **talk to Mr. Hector M. Holmes** of the Boston office of Fish, Richardson & Neave. Mr. Holmes is currently **representing a similar suit** that will be argued . . . **before the First Circuit Court of Appeals** (the highest federal court except the U. S. Supreme Court) . . ."

"**The Board decided** that the firm of Fish, Richardson & Neave was undoubtedly the best that could be had to fight a test case with Park-In, Inc. and stand a reason-

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts
(continued)

ably good chance of winning. . . . In theatre matters regarding the Park-In patent they now **represent the E. M. Loew interests in the Providence suit** . . . and **it's outcome is going to be very important to drive-in operators throughout the country.** . . ."

". . . our case . . . goes to the Fourth Circuit Court of Appeals . . . **Mr. Holmes feels that we have a good chance of winning the** . . . **suit in the Circuit even if lost in the lower court, especially if the Loew case is won in the First Circuit. If that Court holds the patent valid, the chances would be less.** . . ."

"the cost of . . . **a patent case** . . . **runs into big money** . . ."

"The Board of Directors decided . . . to agree to aid . . . financially. . . ."

". . . it is of utmost importance that the association continue its efforts to raise money to be sure to have enough on hand and coming in to enable us to assist . . . the best possible defense. **The cost of patent litigation is very substantial** . . . This matter is . . . important . . . redouble your efforts to secure as many members for the association as possible and that all members and non-members operating drive-in theatres . . . make as large a donation to this fund to pay first class attorneys as is possible."

"This case is important to all of us . . ."

"A statement . . . **from Mr. Holmes follows in his own words:** . . .

'The U. S. Supreme Court might consent to review the decision of the Appellate Court if asked to do so' . . .

'to merely contribute to the defense of . . . suit . . . does not make such a contributor a party to the suit or bound by the outcome, except as he . . . is subject to **the law as determined in the case** of the Appellate Court **of the U. S. Supreme Court.'**

'. . . the cost of defending a patent case is substantial.' "

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts
(continued)

Exhibit 15 (October 31, 1948) **Bulletin No. 5** of the **Drive-In Theatre Owners Association, Inc.**

"**3. Is the Park-In Theatres, Inc. patent (Hollingshead) valid?** . . . the association . . . is through its membership, financially aiding . . . in giving the best defense possible to the suit brought . . . by the Park-In Theatres, Inc. . . . **If your theatre** is ramped, terraced or **has a car aiming device** (or if you plan to have one) **then the association is aiding your theatre financially—you should be a member and help pay these expenses.**"

"**If you are not a member of the special litigation group—join now!**"

Exhibit 16 (April 16, 1949) **BOXOFFICE** (page 9)

"**Can't Patent Drive-In Idea, U. S. Court of Appeals Holds**"

"**Important Decision Goes Against Park-In Which Sued on Infringement**"

"Boston—In the most important decision handed down to date on the validity of drive-in ramp patents, the United States Circuit Court of Appeals this week ruled against Park-In Theatres of Camden, N.J., in a suit charging infringement of patents."

"As the Circuit Court of Appeals is the second highest court in the land, the opinion has particular significance. When the case is appealed it steps up to the Supreme Court. Park-In has announced that an appeal will be taken. Hundreds of thousands of dollars in licensing fees are involved."

"**This week's decision has widespread ramifications.** Not only are many drive-in operators currently paying royalties to Park-In Theatres, but others have refused to pay and are being sued."

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts
(continued)

Exhibit 17 (April 30, 1949) **BOXOFFICE** (page 22)

"Men and Events"

"Drive-In Patent"

"An undercurrent of excitement spread across the country among drive-in theatre owners and prospective owners following the U. S. circuit court of appeals ruling in Boston that the patent of Park-In Theatres of Camden, N.J., **was invalid. Progress of the case to the Supreme Court will be watched with keen attention."**

"Some drive-in operators have paid royalties based on a percentage of receipts; others have paid for a time and have then refused to pay; still others have paid no attention to the patent. **The prospects of litigation have loomed large in the calculations of everyone concerned."**

"Eastern operators are loath to discuss the case before a final decision. Some of them are already defendants in suits."

Exhibit 18 (May 18, 1949) **The Exhibitor** (page 16)

"Levy Offers Opinion on Drive-In Decision"

"New York—Herman M. Levy, **general counsel, TOA,*** last week **released a digest of the decision in the case of Loew's Drive-In Theatre, Inc., vs. Park-In Theatres, Inc.,** decided by the U. S. Court of Appeals for the First District of Boston on April 8, and pointed out that 'technically only those states that are included in this particular Circuit Court (Maine, New Hampshire, Massachusetts and Rhode Island) are affected by this decision. In those states, drive-in theatre operators may fairly safely decide to withhold further royalty payments at least until an adverse decision, if any, on appeal. As to operators in the other states, it would be best for them to consult their attorneys to determine their opinions as to: (1) whether the Supreme Court will consent to hear the appeal; and, (2) the probable decision of the Supreme

* Theatre Owners of America.

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts
(continued)

Court. Both of those items should be explored before a conclusion is reached as to whether the payment of royalties should be discontinued."

"He said further: **'In the light of the decision,** some **confusion** may be **developed in the industry** by the case of Park-In Theatres vs. Rogers, 130 F. (2d) 745 (California).' . . ."

Exhibit 19 (May 28, 1949) **BOXOFFICE** (page 79)

"Rush to Build Drive-Ins On in New England Area"

"Boston—New England drive-in construction has taken a decided upward surge this spring, partially **caused,** it is believed, **by a circuit court of appeals decision in the case of Park-In Theatres, Inc.,** of Camden, N.J., **and E. M. Loew's.** The judges reversed a decision by the lower court of Providence and stated that **drive-in owners did not have to pay royalties to the New Jersey company."**

Exhibit 20 (July 16, 1949) **The Independent Film Journal**

"Drive-in Infringement Issue Before Supreme Court for Final Ruling"

Exhibit 21 (August 9, 1949) **The Film Daily** (cover)

"Park-in Wins Right to Amend Richards' Plaint"

"Wilmington—Federal Judge Richard S. Rodney entered a court **order** upholding the right of **Park-In Theatres, Inc.,** to file an amended complaint in its **patent suit against Paramount-Richards Theaters, Inc.,** Paramount-Richards Enterprises, Inc., Kennington-Richards Enterprises, Inc., Richards-Ehrlich Enterprises, Inc., Saenger Theaters Corp., Capitol Theater Corp., and United Theaters, Inc., and **denying defendants' motion for summary judgment as to the original complaint.**

"Judge Rodney also deferred disposition on Park-In's motion to strike the brief attached to the affidavit of **Hector M. Holmes,** filed in support of the defendants' dismissal motions."

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts
(continued)

Exhibit 22 (October 8, 1949) **Motion Picture Herald** (page 16)

"**High Court to Act Quickly**"

"**Expect Early Decision** on Five Actions **Involving the Film Industry**"

"**The Supreme Court next Monday, October 10, probably will dispose of** most . . . film industry cases now pending . . ."

"A fourth **case** involves the validity **of Park-In Theatre's drive-in patent** . . ."

"The drive-in patent dispute arose when Park-In Theatres, Inc., sued Loew's Drive-In Theatres, Inc., . . ."

". . . **Hollingshead patent, containing a basic layout for drive-in structures** . . ."

"**Levy warned on Drive-ins**

"**In a recent analysis of the case, Herman Levy, TOA* general counsel, said it was fairly safe for drive-in operators in the states covered by the First Circuit Court to withhold payments under the Hollingshead patent,** . . ."

Exhibit 23 (October 10, 1949) **The Film Daily** (page 1)

"**Await Supreme Court Action** on 5 Appeals"

"Washington—As the Supreme Court settles down today to its first real business session, action is anticipated on five cases **affecting the film industry** . . ."

"On the Supreme Court agenda and believed about ready for disposal, are . . . fifth appeal was brought by **Park-In Theaters,** in its patent infringement suit **against Loew's Drive-In Theaters, Inc.** District Court found for Park-In but was reversed by the Circuit Court of Appeals."

* Theatre Owners of America.

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts
(continued)

Exhibit 24 (October 11, 1949) **The Film Daily** (page 1)

"High Court Nixes Hollingshead Royalty Charges"

"Upholding the First Circuit Court of Appeals, the U.S. Supreme Court yesterday notified drive-in operators that they need have no fear about infringing the so-called Hollingshead patents. That was the effect of the court's decision to refuse to review the lower court action, throwing out a suit for royalties brought by Park-In Theatres, Inc., against Loew's Drive-In Theaters, Inc."

". . . Richard M. Hollingshead of Park-In, which had built the first such theater in Camden, N.J."

". . . In April of this year the Appeals Court reversed the lower court in a decision which, now that it is upheld by the Supreme Court, is expected to mean the end of royalty payments by an undetermined number of drive-ins which are said to have been paying on the Hollingshead claims."

Exhibit 25 (October 13, 1949) **The Film Daily** (cover)

"Myers Hails Hi Court Stand on Patent Suit"

"Washington—**Allied* General Counsel** A. F. Myers Tuesday **hailed the Supreme Court action in refusing to review a lower Court dismissal of a patent case involving ramps for drive-in theaters as 'tremendously important.'** "

Exhibit 26 (October 15, 1949) **BOXOFFICE** (cover & p. 8)

"Supreme Court Invalidates Patent on Drive-In Ramps"

"The decision of the court not to accept case is expected to have widespread ramifications in the film industry."

"Many have Paid Royalties"

"It lifts the threat of litigation from those building drive-in theatres. It is expected to clear court dockets

*Allied States Association of Motion Picture Exhibitors (729 15th Street, N. W., Washington 5, D. C.).

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts
(continued)

across the country of suits filed in the last several years by Park-In Theatres against exhibitors who refused to pay royalties to the company. In addition, **many drive-in theatre operations who have been holding royalty payments in escrow pending the outcome of the patent controversy** will now be able to release the frozen funds."

"**Seeking New Patrons Through Drive-Ins**"

"Chicago—**Loew's, Inc., is interested in utilizing the drive-in theatre as a medium to develop new patronage for motion picture theatres, . . .**"

"**Many drive-in theatres have been paying royalties right along to Park-In Theatres, and it is quite possible that they will drop these payments immediately on advice of such well-known industry counselors as Abram Myers, Allies States Ass'n board chairman and general counsel.**"

". . . exhibitor counselors pointed out, that other circuits will follow the Boston reasoning as a result of the Supreme Court action."

". . . there are two decisions on Circuit Court records which hold with the Park-In Theatre argument that the drive-in ramp idea is patentable. These decisions were handed down in Philadelphia and San Francisco a number of years ago. These rulings are still the law in these circuits, however, attorneys believe now that the highest court has held with the Boston court, the circuit courts will follow the same reasoning in any new suits brought by Park-In Theatres."

"Abram Myers, **Allied States* Ass'n** general counsel, upon hearing of the high court action advised members not to pay royalties from here on in, and it is likely that members of Allied will heed his advice."

"Myers Says Ruling Clears the 'Problem'

Washington—**Abram F. Myers, general counsel for Allied States,* said the Supreme Court's refusal to hear the drive-in patent case clears that problem for exhibitors.**"

". . . Myers predicted that other circuit courts of appeals will follow the decision of the appeals court in

* Allied States Association of Motion Picture Exhibitors (729 15th Street, N. W., Washington 5, D. C.).

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts
(continued)

Boston. . . . **Exhibitors can now go ahead and build drive-in theatres without fear of patent infringement, he said.**"

Exhibit 27 (October 15, 1949) **Showmen's Trade Review** (page 5)

"**U. S. Supreme Court Knocks Out Hollingshead Drive-In Patent**"

"**Refusal to Review Decision in E. M. Loew Suit Upholds Invalidation by Lower Court**"

". . . **U. S. Supreme Court . . . upheld a ruling** by the first U. S. Circuit Court of Appeals **which nullifies the** Hollingshead **patents on ramp systems for drive-ins.**"

"But the **high court's refusal to review** the Hollingshead **Park-in suit, . . . aroused the greatest amount of interest among exhibitors.**"

"**Myers Hails High Court Stand**"

"National Allied* General Counsel Abram F. Myers Tuesday referred to the **Supreme Court's refusal to review** the Hollingshead patent **case** as **'tremendously important.'**"

Exhibit 28 (October 15, 1949) **Motion Picture Herald** (page 16)

"**Rule Patent on Drive-In is Invalid**"

"The Supreme Court Monday refused to review a lower court decision holding the Hollingshead Drive-in Theatre patent invalid."

"**Industry lawyers have been carefully watching for high court action in this case,** and **this week's decision is expected to have wide repercussions in the drive-in business.** Park-In Theatres, Inc. present holder of the **Hollingshead patent,** which **lays out the basic drive-in structure,** has been collecting royalties from many drive-ins and seeking damages from others for patent infringement."

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*Allied States Association of Motion Picture Exhibitors (729 15th Street, N. W. Washington 5, D. C.).

Showing immediate and great importance of suit at bar, to whole industry and to many Federal Courts
(continued)

Exhibit 29 (October 19, 1949) **The Exhibitor** (page 10)

"Park-In Loses Appeal on Drive-In Royalties"

"Washington—**By refusing to review the case, the U. S. Supreme Court** last week **upheld the First Circuit Court of Appeals' decision in Park-In Theatres, Inc. vs. Loew's Drive-In Theatres, Inc.,** Providence, R. I., **which held Park-In had no grounds for royalties collection.**"

". . . the Appeals Court reversed the lower court in the decision which the Supreme Court has now upheld. **The decision is expected to end royalty payments by an undetermined number of drive-ins which had been paying them to Hollingshead.**"

FILE COPY

NOV 8 1949

CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

No. 170

October Term, 1949

Park-In Theatres, Inc.
plaintiff-petitioner

v.

Loew's Drive-In Theatres, Inc.
defendant-respondent

APPENDIX

to Petition for Re-Hearing under Rule 33(2)
containing Affidavits and Exhibits
in support of Petition for Re-Hearing

Douglas W. McGregor
Leonard L. Kalish
Melvin R. Jenney
Thomas J. Flynn
attorneys and counsel for petitioner

Press of Allen, Lane & Scott, Philadelphia.

Table of Contents of APPENDIX

Affidavits

PAGES

Affidavit of Guy W. Meek dated October 31, 1949..... 1a to 5a

Affidavit of R. A. Edmondson, Jr., dated November 1, 1949..... 6a to 9a

a list of the "Dixie Drive-In Theatres" group of companies and chain of drive-in theatres licensed under Hollingshead patent 1,909,537 referred to in, and annexed to, R. A. Edmondson, Jr.'s affidavit... 10a & 11a

Affidavit of Willis Warren Smith dated November 8, 1949. 12a to 23a

Affidavit of Robert McCay Green dated November 8, 1949..... 24a to 27a

Trade (and other) Publications

showing importance, size and current expansion of drive-in theatre industry founded on Hollingshead patent 1,909,537

Date of Exhibit

May 16, 1948: The Philadelphia Inquirer's magazine-section entitled "Everybody's Weekly", containing article entitled "*Growth of Drive-In Movies*" by Edgar Williams.....Exhibit 1

July 17, 1948: Motion Picture Herald, article entitled "*The Roof's the Sky and Sky is Drive-In Limit*"....Exhibit 2

July 17, 1948: The BOXOFFICE, article entitled "*50 Drive-Ins at Pittsburgh, as Outdoor Theatres Boom*"..Exhibit 3

November 13, 1948: The BOXOFFICE, article entitled "*Drive-Ins up from 100 to 761 in 20-Month Building Boom*", by Sumner Smith.....Exhibit 4

June 11, 1949: The BOXOFFICE, the column known as "Men and Events" by James M. Jerauld, containing article entitled "*Drive-Ins Booming*".....Exhibit 5

June 11, 1949: Motion Picture HERALD, article entitled "*Bigger and Better Drive-ins Boom*".....Exhibit 6

Date of Exhibit

June 20, 1949: TIME (Cinema section), article entitled *"All This, and Movies Too"*.....Exhibit 7

July 23, 1949: The BOXOFFICE, article entitled *"Rodgers Says Drive-Ins Creating New Patrons"*.....Exhibit 8
(William F. Rodgers, vice president and general manager of M-G-M)

July 30, 1949: The Independent Film Journal, article entitled *"Drive-Ins Create New Patrons for Motion Pictures—Rodgers"*.....Exhibit 9
(William F. Rodgers, vice president and general manager of M-G-M)

August 24, 1949: The EXHIBITOR, article entitled *"Speaking of Drive-Ins, Let's Give Proper Credit"*....Exhibit 10

October 1, 1949: The NEW YORKER, the column entitled *"The Talk of the Town"*, containing article on drive-in theatres entitled *"Moon-Washed"*, based on interview with Mr. Harvey Elliott, manager of the White Stone Drive-In Theatre.....Exhibit 11

October 8, 1949: The BOXOFFICE, article entitled *"Drive-In Clearance Rights Placed Before the Court"*..Exhibit 12

Trade Publications

showing the confusion created in the drive-in theatre industry by the decision of the First Circuit (in the case at bar) and the immediate and great importance of the resolution, by this Court, of the questions presented by the Petition for Writ of Certiorari, both to the industry as a whole as well as to the many Federal Courts involved in the otherwise inevitably widespread litigation based on the patent here on suit.

August 28, 1948: The Charlotte (N. C.) News, article entitled *"Drive-In Men May Form Association"*.....Exhibit 13

October 25, 1948: Bulletin No. 4 of the *Drive-In Theatre Owners Association, Inc.*.....Exhibit 14

October 31, 1948: Bulletin No. 5 of the *Drive-In Theatre Owners Association, Inc.*.....Exhibit 15

April 16, 1949: The BOXOFFICE, article entitled *"Can't Patent Drive-In Idea, U. S. Court Of Appeals Holds"*.....Exhibit 16

Date of Exhibit

April 30, 1949: The BOXOFFICE, the column known as *"Men and Events"* by James M. Gerauld, containing article entitled *"Drive-In Patent"*.....Exhibit 17

May 18, 1949: The EXHIBITOR, article entitled *"Levy Offers Opinion on Drive-In Decision"*.....Exhibit 18
(Herman M. Levy, Esq., general counsel for Theatre Owners of America.)

May 28, 1949: The BOXOFFICE, article entitled *"Rush to Build Drive-Ins On in New England Area"*.Exhibit 19

July 16, 1949: The Independent Film Journal, article entitled *"Drive-in Infringement Issue Before Supreme Court For Final Ruling"*.....Exhibit 20

August 9, 1949: The FILM Daily, article entitled *"Park-In Wins Right to Amend Richards' Plaint"*.. Exhibit 21

October 8, 1949: Motion Picture HERALD, article entitled *"High Court to Act Quickly"*.....Exhibit 22

October 10, 1949: The FILM Daily, article entitled *"Await Supreme Court Action on 5 Appeals"*.....Exhibit 23

October 11, 1949: The FILM Daily, article entitled *"High Court Nixes Hollingshead Royalty Charges"*...Exhibit 24

October 13, 1949: The FILM Daily, article entitled *"Myers Hails Hi Court Stand on Patent Suit"*.....Exhibit 25
(Abram F. Myers, general counsel for Allied States Association of Motion Picture Exhibitors, of 729 15th Street, N. W., Washington, D. C.)

October 15, 1949: BOXOFFICE, article entitled *"Supreme Court Invalidates Patent on Drive-In Ramps"*..Exhibit 26

October 15, 1949: Showmen's Trade Review, articles entitled *"U. S. Supreme Court Knocks Out Hollingshead Drive-In Patent"* and *"Myers Hails High Court Stand"*.....Exhibit 27
(Abram F. Myers, general counsel for Allied States Association of Motion Picture Exhibitors, of 729 15th Street, N. W., Washington, D. C.)

October 15, 1949: Motion Picture HERALD, article entitled *"Rule Patent on Drive-in Is Invalid"*.....Exhibit 28

October 19, 1949: The EXHIBITOR, article entitled *"Park-In Loses Appeal on Drive-In Royalties"*.....Exhibit 29

Letters written by Licensees under Hollingshead patent 1,909,537

showing the confusion created in the drive-in theatre industry by the decision of the First Circuit (in the case at bar) and the immediate and great importance of the resolution, by this Court, of the questions presented by the Petition for Writ of Certiorari, both to the industry as a whole as well as to the many Federal Courts involved in the otherwise inevitably widespread litigation based on the patent here on suit

Date of Exhibit

April 27, 1949, letter from Wilford C. Varn, attorney for Davis Drive-In Theatre of Panama City, Florida, addressed to Petitioner.....Exhibit 30

May 31, 1949, letter from Wilford C. Varn, attorney for Davis Drive-In Theatre, Panama City, Florida, addressed to Leonard L. Kalish, patent-counsel for Petitioner.....Exhibit 31

May 14, 1949, letter from Wometco Theatres (Boulevard Drive-In Realty Co.) of Miami, Florida, addressed to Petitioner.....Exhibit 32

June 14, 1949, letter from Wometco Theatres (Boulevard Drive-In Realty Co.) of Miami, Florida, addressed to Paxson, Kalish, Dilworth & Green, attorneys for Petitioner.....Exhibit 33

September 1, 1949, letter from Bernstein & Hodsdon, attorneys for Boulevard Drive-In Realty Co. of Miami, Florida, addressed to Paxson, Kalish, Dilworth & Green, attorneys for Petitioner.....Exhibit 34

May 20, 1949, letter from 101-Theatre Corp. of Ventura, California, addressed to Petitioner.....Exhibit 35

July 22, 1949, letter from Open Air Amusements Inc., of Grand Junction, Colorado, addressed to Paxson, Kalish, Dilworth & Green, attorneys for Petitioner...Exhibit 36

July 22, 1949, letter from Clagett & Schilz, attorneys for the B & S Theatres Corp. of Washington, D. C. addressed to Paxson, Kalish, Dilworth & Green, attorneys for Petitioner.....Exhibit 37

July 26, 1949: Letter from Motor-Vu Theatre Inc., of Laurel, Montana, addressed to Paxson, Kalish, Dilworth & Green, attorneys for Petitioner.....Exhibit 38

August , 1949, Letter from Thompson, Thompson & Rogan, attorneys for California Drive-In Theatres Inc., addressed to Paxson, Kalish, Dilworth & Green, attorneys for Petitioner.....Exhibit 39

August 4, 1949, Letter from L. S. Hamm, attorney for Monterey Theatres Co. of San Francisco, California, addressed to Paxson, Kalish, Dilworth & Green, attorneys for Petitioner.....Exhibit 40

August 9, 1949, Letter from M. C. Delle, attorney for First National Theatres Co. of Yakima, Washington, addressed to Paxson, Kalish, Dilworth & Green, attorney for Petitioner.....Exhibit 41

August 18, 1949, Letter from J. C. Halbersleben, attorney for Pioneer Drive-In Theatres Inc. of Povo, Utah, addressed to Paxson, Kalish, Dilworth & Green, attorneys for Petitioner.....Exhibit 42

October 17, 1949, Letter from Claude Ezell & Associates Inc., of Dallas, Texas, addressed to Petitioner.Exhibit 43

October 21, 1949, Letter from Stockade Theatres, Inc., and Plantation Theatres, Inc., of Williamsburg, Virginia, addressed to Petitioner.....Exhibit 44

Status of other suits

List of other suits based upon Hollingshead patent 1,909,537, giving their identification and status.....Exhibit 45

Progress of case of *Park-In Theatres, Inc.*, vs *Paramount-Richards Theatres, Inc., et al* (C. A. 1072) in the U. S. District Court for the District of Delaware.....Exhibit 46

IN THE SUPREME COURT OF THE UNITED STATES

Park-In Theatres, Inc. plaintiff-petitioner v. Loew's Drive-In Theatres, Inc. defendant-respondent	No. 170 October Term, 1949

Affidavit of Guy W. Meek
in support of Petition for Re-Hearing

State of California }
County of Santa Clara } *ss*

I, Guy W. Meek, being duly sworn, depose and say:

I am a citizen of the United States of the State of California, residing at 140 Green Oaks Drive, in Atherton, San Mateo County, California, and I am a Lieutenant in the United States Naval Reserve, on inactive duty, having been on active duty, in the United States Navy, from 1941 to 1944, inclusive.

Directly upon being put on inactive status at the end of 1944, I became interested and engaged in the building and operation of drive-in theatres of the kind and construction disclosed in and covered by Hollingshead patent No. 1,909,537 (with which patent I am thoroughly familiar), because I then sensed a large and growing public demand for drive-in theatres of the construction covered by Hollingshead patent No. 1,909,537, and since the early part of 1945, I have been continuously active in the building and operation of such drive-in theatres, as more fully set out hereinbelow.

In 1945, I built the Bakersfield Drive-In Theatre at Bakersfield, California and operated it until this year, when I sold the Bakersfield Drive-In Theatre to other interests. Throughout the time I operated the Bakersfield

Drive-In Theatre, I paid royalties under Hollingshead patent 1,909,537, in respect to the Bakersfield Drive-In Theatre.

In 1946 I built the San Jose Drive-In Theatre at San Jose, California and have operated it ever since. In 1947 I built the Peninsula Drive-In Theatre at Palo Alto, California, the Oakland Drive-In Theatre at San Leandro, California, and the Redwood Drive-In Theatre, at Cotati, California. I sold my interest in the Redwood Drive-In Theatre in 1948. Throughout the time that I had an interest in the Redwood Drive-In Theatre, it paid royalties under Hollingshead patent 1,909,537. I have continued to operate and have a substantial interest in the San Jose Drive-In Theatre and each of these has paid and is still paying royalties under Hollingshead patent 1,909537.

The five above-mentioned drive-in theatres represent capital investment of $750,000.00, exclusive of the land as to four of them;—only the land-cost of the Palo Alto Drive-In Theatre being included in the $750,000.00 (the other of the above-mentioned drive-in theatres having been built on leased land).

In addition to my present and continued and substantial interest in and my operation of the San Jose Drive-In Theatre, the Peninsular Drive-In Theatre and the Oakland Drive-In Theatre, I am also regularly engaged in booking film for the above-mentioned Redwood Drive-In Theatre and also for the Crescent Drive-In Theatre at Vallejo, California.

The Crescent Drive-In Theatre has paid and is still paying royalties under Hollingshead patent 1,909,537. The Redwood Drive-In Theatre has stopped paying royalties under Hollingshead patent 1,909,537 and is now operated in infringement of said patent. In the past I have also been engaged in booking film for still other drive-in theatres in California.

I also have been in frequent active consultation with many drive-in theatre operators owning and operating drive-in theatres of the construction covered by Hollingshead patent 1,909,537, both on the West Coast and else-

where in the United States and have attended many meetings of drive-in theatre operators in the last five years in many parts of the Country and have personally visited over two hundred such drive-in theatres.

Recently I became one of the organizers of a trade association of drive-in motion picture theatre owners known as the National Association of Drive-In Theatres, a non-profit association organized for the purpose of disseminating information useful in the operation of drive-in theatres and in generally promoting the interests of drive-in theatre owners and operators. Since about October 1, 1949 this association has obtained 45 dues-paying members located in Alabama, California, Colorado, Connecticut, Florida, Georgia, Indiana, Illinois, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas and Virginia.

Drive-In theatres of the construction covered by patent No. 1,909,537 have enormously increased in number in the last few years, namely, since the end of the recent War, and such drive-in theatres represent an unusual investment opportunity, as profit yields are substantially greater than of the conventional indoor motion-picture houses.

I estimate there are now well over a thousand drive-in theatres throughout the United States, representing a total investment of upwards of $150,000,000.00.

Because of my familiarity with the drive-in theatre industry, I believe that I voice the views of the majority of the persons engaged in this industry.

I am vitally interested and I believe also the large majority, if not, indeed, all the owners and operators of drive-in theatres are vitally interested in an early determination of the validity of Hollingshead patent 1,909,537 by the Supreme Court of the United States.

The granting of the writ of certiorari prayed for in the instant case would relieve the industry of its great state of confusion and uncertainty created by the recent decision handed down by the U. S. Court of Appeals for the First Circuit on April 8, 1949, in the case of *Loew's*

Drive-In Theatres Inc. v. *Park-In Theatres, Inc.* (174 F. 2d 547), and the decision handed down on September 14, 1942 by the U. S. Court of Appeals for the Ninth Circuit in the case of *Park-In Theatres. Inc.* v. *M. A. Rogers et al* (130 F. 2d 745), on the same patent, as the entire industry has either been paying royalties under Hollingshead patent 1,909,537 or, in my opinion, has set aside sums of money equal to such royalties in contingent reserve funds or escrow accounts, and is continuing to do so, awaiting a determination of the validity of the Hollingshead patent by the Supreme Court of the United States.

To refuse to grant the writ of certiorari in the instant case would not only continue the aforesaid confusion and uncertainty in this large and vastly expanded industry, because of the delay which would inevitably be encountered in obtaining a decision of another Circuit, in one of the many now-pending patent-infringement suits based on this patent or in such newly filed patent-infringemet suits as may hereafter be filed thereon. A refusal to grant the petition for writ of certiorari in the instant case would also impose a great and continuing financial burden and inconvenience upon all litigants and the many more prospective litigants in respect to the validity and infringement of Hollingshead patent 1,909,537, as well as upon those who have withheld royalty payments under license agreements still in force.

A determination of the validity of Hollingshead patent 1,909,537, by the Supreme Court of the United States, in the instant case, would relieve not only the parties to this suit but also the many other litigants in the now-pending patent infringement suits and all drive-in theatre owners or operators who either have infringed this patent or have suspended royalty payments under subsisting licenses under this patent, of the great costs and inconvenience of protracted litigation, and would also relieve the courts of the inconvenience of such extensive and protracted litigation, because if the validity of Hollingshead patent 1,909,537 is sustained by this Court, in the instant suit, all licensees, in my opinion, will undoubtedly and willingly

pay up all the royalties withheld under subsisting license-agreements and all infringers will, undoubtedly, willingly pay a similar royalty in settlement of all claims of infringement:—all without need of further litigation. Likewise, if this Court should, in the instant case, hold Hollingshead patent invalid, such decision will likewise, no doubt, bring an end to all further patent-infringement suits. Hence not only the convenience of the litigants involved in the instant suit, but also the convenience of an entire industry and also the convenience of the many courts involved, should incline this Court to grant a writ of certiorari in respect to and review the decision of the U. S. Court of Appeals for the first circuit in the above-mentioned case of *Loew's Drive-In Theatres* v. *Park-In Theatres, Inc.*

(signed) GUY W. MEEK

Sworn to and subscribed before me this 31st day of October, 1949.

(signed) M. W. BAILEY
notary public

[SEAL]

Notary Public in and for the County of Santa Clara, State of California.
My commission expires Dec. 5, 1950

IN THE SUPREME COURT OF THE UNITED STATES

Park-In Theatres, Inc. plaintiff-petitioner *v.* Loew's Drive-In Theatres, Inc. defendant-respondent	No. 170 October Term, 1949

Affidavit of R. A. Edmondson, Jr.
in support of Petition for Re-hearing

State of Georgia }
County of Fulton } *ss*

I, R. A. Edmondson, Jr., being duly sworn, depose and say:

I am a citizen of the United States and of the State of Georgia, residing at 7 Garmon Road, Fulton County, Georgia. I am a graduate of the Law School of Emory University, of Atlanta, and I am attorney-at-law and a member of the Georgia Bar and have been engaged in the active practice of law from 1927, in Atlanta, Georgia. I have my law offices in Suite 304 Walton Building in Atlanta, Georgia.

Since 1939 I have devoted an increasing amount of my time to the building, operation and management of drive-in theatres of the kind covered by Hollingshead patent 1,909,537, as shown more particularly hereinbelow, and for the past years I have so devoted the major part of my entire time. My offices for the drive-in theatre business are in Suite 304 Walton Building, Atlanta, Ga., and the many companies involved are sometimes collectively referred to as the "Dixie Drive In Theatres."

I first became interested in the building, operation and management of drive-in theatres, of the kind covered by Hollingshead patent No. 1,909,537, in 1939, when, in association with other investors, I commenced the build-

ing of the first of such drive-in theatres (of a chain of such drive-in theatres) under license from petitioners, Park-In Theatres, Inc., under Hollingshead patent No. 1,909,537.

Attached hereto is a list of 16 corporations and partnerships, of the group generally known as the "Dixie Drive-In Theatres", in each of which I have a substantial interest as a partner or stockholder and in each of which I am an officer and director and active in the management, with the exception of 1, 2 and 8, which became inactive on account of the discontinuance of the corresponding drive-in theatres, but in each of which (1, 2 & 8) I also had a substantial interest, and was active, during the time the corresponding drive-in theatres were in operation.

Drive-In theatres numbered 1 and 2, in the accompanying list, were discontinued several years ago and were replaced by one of the other drive-in theatres, above identified, while the Durham Drive-In theatre (numbered 8 in the list) was abandoned during the War when the screen-house was destroyed by fire and has not been rebuilt. The other drive-in theatres numbered 3 to 7 and 9 to 14 have been in operation to the present time.

We have paid royalties in the total sum of approximately $175,000.00 in respect to drive-in theatres numbered 1 to 14, inclusive, up to the time of the decision of the U. S. Court of Appeals for the First Circuit in the case of *Loew's Drive-In Theatres Inc.* v. *Park-In Theatres Inc.* (174 F. 2d 547) handed down on April 9, 1949, when we suspended all further royalty payments.

The drive-in theatres identified in the accompanying list (including the two drive-in theatres presently being built) represent a total investment of approximately $1,500,000.00.

I am well acquainted in the drive-in theatre industry. Since the War, a large number of drive-in theatres have been built and are presently being built. Because of the great expansion of these drive-in theatres, since the War, and more particularly the last two or

three years, perhaps no fully accurate count has yet been made of the total number of drive-in theatres which have actually opened and gone into operation, as of today, nor of the total number of drive-in theatres now in the process of being built. I estimate that over a thousand drive-in theatres have been completed and put into operation up to this time, and that several hundred are now in the process of being built throughout the United States.

I, and my associates and co-investors in the drive-in theatres identified in the accompanying list, and I believe also all other owners and operators of drive-in theatres, throughout the United States, are vitally interested in an early determination, by this Court, of the validity of Hollingshead patent 1,909,537, because there is confusion and uncertainty in the drive-in theatre industry, by reason of the decision of the U. S. Court of Appeals for the First Circuit in the case of *Loew's Drive-In Theatres, Inc.* v. *Park-In Theatres, Inc.*, (174 F. 2d 547) handed down on April 8, 1949, and the decision handed down by the U. S. Court of Appeals for the Ninth Circuit on September 14, 1942, in the case of *Park-In Theatres, Inc.* v. *M. A. Rogers et al.* (130 F. 2d 745).

The refusal to grant a writ of certiorari, in the case at bar, would continue the aforesaid confusion and uncertainty in the drive-in theatre industry.

The granting of a writ of certiorari in the instant case would, in my opinion, represent a substantial convenience not only to the litigants in the case at bar but also to litigants in the many now-pending suits involving this patent as well as the many other prospective litigants (in infringement suits and royalty suits) and would also represent a substantial convenience to the many federal courts which would be involved in such litigation, both in respect to the infringement of the patent as well as in respect to royalties under licenses under this patent.

Therefore, the granting of a petition for writ of certiorari and the final determination of the validity of this patent, by this Court, in the case at bar, would be

of paramount importance to the large and expanding drive-in theatre industry as well as to the many federal courts which would otherwise have to determine considerably more litigation in respect to this patent and the licenses thereunder.

(signed) R. A. EDMONDSON, JR.

Sworn to and subscribed before me this 1st day of November, 1949.

(signed) JOSEPHINE S. KILGO
[SEAL] Notary Public Fulton Co. Ga.

The "Dixie Drive-In Theatres"
group of companies and drive-in theatres
licensed under Hollingshead patent 1,909,537

1. "Piedmont Drive-In Theatre", on Piedmont Avenue, in Atlanta, Ga., built in 1939 by Piedmont Parking Theatre, Inc. (a Georgia corporation) under license dated March 1, 1939

2. "Stewart Drive-In Theatre", on Stewart Avenue, in Atlanta, Ga., built in 1939 by Parking Palace Theatres, Inc. (a Georgia corporation) under license dated March 1, 1939

3. "Victory Drive-In Theatre", in Savannah, Ga., built in 1939 by Savannah Drive-In Theatre, Inc. (a Georgia corporation) under license dated March 3, 1939

4. "Jax Drive-In Theatre", in Jacksonville, Fla., built in 1940 by Jack's Drive-In Theatre, Inc. (a under license dated December 15, 1939

5. "Orlando Drive-In Theatre", in Orlando, Florida, built in 1940 by Orlando Drive-In Theatre, Inc. (a Florida corporation) under license dated December 15, 1939

6. "Augusta Drive-In Theatre", in Augusta, Georgia, built in 1941 by Augusta Drive-In Theatre (a partnership) under license dated May 9, 1940

7. "South 29th Drive-In Theatre", near Charlotte, N. C., built in 1940 by Charlotte Drive-In Theatre, Inc. (a Georgia corporation) under license dated May 9, 1940

8. "Durham Drive-In Theatre", in Durham, N. C., built in 1941 by Durham Drive-In Theatre, Inc. (a Georgia corporation) under license dated May 9, 1940

9. "South Drive-In Theatre", in Greensboro, N. C., built in 1941 by Greensboro Drive-In Theatre, Inc. (a Georgia corporation) under license dated March 31, 1941

10. "Macon Drive-In Theatre", in Macon, Ga., built in 1941 by Macon Drive-In Theatre, Inc. (a Georgia corporation) under license dated December 20, 1941

11. "Piedmont Drive-In Theatre", in Atlanta, Ga., built in 1947 by Atlanta Drive-In Theatre, Inc. (a Georgia corporation) under license dated June 15, 1947

12. "Stewart Drive-In Theatre", in Atlanta, Ga., built in 1949 by Stewart Drive-In Theatre, Inc. (a Georgia corporation) under license dated October 15, 1948

13. "North Drive-In Theatre", near Greensboro, N. C., built in 1949 by Guilford Drive-In Theatre, Inc. (a Georgia corporation) under license dated November 26, 1948

14. "North 29 Drive-In Theatre", near Charlotte, N. C., acquired in 1949 by Mecklenburg Drive-In Theatre, Inc. (a Georgia corporation) and licensed on January 17, 1949

15. "Chatham Drive-In Theatre", in Chatham County, Ga., presently in the process of being built by Chatham Drive-In Theatres, Inc. (a Georgia corporation) without license under patent 1,909,537

16. "Orange Drive-In Theatre", near Orlanda, Fla., presently in the process of being built by Orange Drive-In Theatre, Inc. (a Florida corporation) without license under patent 1,909,537

IN THE SUPREME COURT OF THE UNITED STATES

Park-In Theatres, Inc.
plaintiff-petitioner

v.

Loew's Drive-In Theatres, Inc.
defendant-respondent

October Term, 1949

No. 170

Affidavit of
Willis Warren Smith
in support of Petition for Re-Hearing

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

I, Willis Warren Smith, upon affirmation, depose and say as follows:

I am 60 years of age, a citizen of the United States and of the Commonwealth of Pennsylvania and a resident of Buckingham, Bucks County, Pennsylvania, and I am petitioner's managing director, and in charge of and familiar with its affairs, and I have been intimately connected with the development of the drive-in theater of the Hollingshead patent 1,909,537 since 1932, when I became associated with Mr. R. M. Hollingshead, Jr., the patentee (who is my cousin), and have been associated with him ever since, in connection with the development of the drive-in theater of his patent 1,909,537.

I make this affidavit in support of the Petition for Re-Hearing in the above-identified case, in which this Court entered an Order on October 10, 1949, denying the Petition (filed July 6, 1949) for Writ of Certiorari.

Exhibits 1 to 29, inclusive, hereto attached, are copies of trade publications and other publications and are listed in the *Table of Contents of Appendix* preceding this affidavit, within the same cover.

Exhibits 30 to 44, inclusive, are copies of letters written by licensees* under Hollingshead patent 1,909,537, and

* Exhibits 30, 31, 32, 35, 43 & 44 being copies of letters received by Petitioner within mailing-time after the respective dates appearing thereon

these are also listed in the *Table of Contents of Appendix* preceding this affidavit, within the same cover.

Exhibits 1 to 13, inclusive, and *Exhibits 16 to 29*, inclusive, are clippings from trade publications and other publications of general circulation, which have been reproduced, hereinbelow, photographically. Exhibits 14 and 15, are two Bulletins (No. 4 and No. 5) of the *Drive-In Theater Owners Association, Inc.*, one of the *several* trade associations and organizations formed in the last few years by large groups of motion-picture exhibitors for the principal purpose of financing and directing the defense of patent-infringement suits which have been instituted or which may be instituted on Hollingshead patent 1,909,537 (here in suit). Exhibits 14 and 15 have not been reproduced photographically but, instead, have been reproduced by reprinting, because the originals of these Bulletins were in mimeographed form and, I was advised, would not reproduce well by the available photographic processes.

Exhibits 1 to 13, inclusive, and *Exhibits 16 to 29*, inclusive, are true copies of the publications of which they purport to be copies (with some condensation), and such publications appeared in the magazines and upon the dates indicated in the reproductions thereof hereto annexed.

Exhibits 14 and 15 are Bulletins distributed by the Drive-In Theater Owners Association Inc. on the dates indicated on the reproductions thereof accompanying this affidavit.

The statements made in Exhibits 1 to 29, inclusive, are the statements of writers who, I believe, largely represent the motion-picture exhibition industry of the entire country.

The emphasis appearing in Exhibits 1 to 5, 10 to 12, 16 to 19 and 22 to 29 (by underscoring) and in Exhibits 14 & 15 (by the bold face of the type) and in Exhibits 30, 31, 32, 35, 43 and 44 (by italics) has been supplied by me, and all footnotes applied to these Exhibits have been supplied by me and represent my interpolations or explanations.

Exhibits 1 to 12, inclusive, are submitted to show the phenomenal expansion, on a truly national scale, of the drive-in theater embodying the invention of Hollingshead patent No. 1,909,537, here in suit, and the tremendous public interest in the invention of this patent, and the *importance of this invention* both to the public and to the motion-picture industry;—the statements contained in these clippings from representative publications (largely trade publications of the industry), being the statements of those familiar with the significance and effect of the drive-in theaters upon the motion-picture industry.

Exhibits 13 to 29, inclusive, are submitted to show that (in view of the widespread infringement of this patent and the many suits still pending and yet to be filed on this patent, as well as the suits to be filed for the collection of past due royalties under licenses) the resolution, by this Court, of the questions presented by the Petition (filed July 6, 1939) for Writ of Certiorari would be of far-reaching and immediate importance to a *new* industry which is undergoing a phenomenal growth, and the resolution of such questions by this Court, would spare not only petitioner but the industry as a whole, of the very large expense of litigation, and would spare many Federal Courts of the burden of extensive further litigation, because decision of this Court, upon the merits of Hollingshead patent No. 1,909,537, *in the present case,* would be accepted not only by the parties to the present action but also by the industry as a whole, as controlling, thereby rendering further patent-litigation unnecessary (see Exhibits 45 & 46 for other patent-infringement suits).

If certiorari is not granted, upwards of 500 additional patent-infringement suits will of necessity have to be filed[1], and in the neighborhood of 100 additional royalty-collection suits will of necessity have to be filed[2], before a decision of another Circuit can be obtained on the question of the validity of the patent, and most if not all of

[1] to stay the running of the time under the applicable statute of limitations, in respect to as many infringers throughout the United States

[2] to stay the various applicable State statutes of limitations

such royalty-collection suits would likewise be in the Federal Courts because of diversity of citizenship and the amount in controversy being in excess of $3000.00.

I helped to finance, manage and direct the building, construction and operation of the first drive-in theatre ever built in the United States or elsewhere, namely, the drive-in theatre which Mr. R. M. Hollingshead, Jr., patentee of patent 1,909,537, built in Camden, New Jersey in 1933 under and in accordance with patent 1,909,537. (See Exhibits 1, 4, 7, 10, 11, 24 and 28, recognizing petitioner's Camden drive-in theatre of 1933 as *the first* drive-in theatre in the world;—and see also R. p. 82).

Because of the film-boycott of some of the major film-distributors and of the discriminatory film-distribution practices of the other film-distributors, practiced against our Camden Drive-In Theater we were compelled to close it down after a few years' operation. Remnants of this discriminatory film-distributing practice are reflected in the second column on the second page of Exhibit 2 under the heading "*Drive-Ins Want Better Product and Clearance*" and in Exhibit 12.

I am advised that this Court in the case of *U. S.* v. *Paramount Pictures, Inc. et al.* (334 U. S. 131), passed upon discriminatory film-distributing practices which were substantially the same as the discriminatory film-distributing practices which were leveled at our Camden Drive-In Theatre, and, since then, also leveled at many of our licensees and prospective licensees who were without film-buying power.

As a result of the economic duress of the aforesaid film-distributing practices engaged in by film-producers and their film-distributors, the patentee R. M. Hollingshead, Jr. and petitioner, his assignee, were forced to abandon further efforts to build and operate their own drive-in theatres of patent 1,909,537 and were forced to turn over the commercial exploitation of the invention of Hollingshead patent 1,909,537 largely to the producers of motion-pictures and to their distributing and exhibiting subsidiaries and affiliates, or to established motion

picture exhibitors owning or operating conventional motion-picture houses who had sufficient film-buying power to enable them to obtain motion-picture film (for the drive-in theatres) neither too old nor overpriced.

Thus, as a result of the aforesaid economic duress, R. M. Hollingshead, Jr. and petitioner were forced to grant licenses to those who had theretofore been established in the motion-picture industry, namely to those who had film-buying power, and Hollingshead and petitioner were forced to grant such licenses upon inadequate royalty rates, and royalty-rates not commensurate with the great benefit and large profit derived from the invention by the licensees.

The aforesaid discriminatory film-distributing practices, aimed to prevent the wider use of the invention of Hollingshead patent 1,909,537 are the basis, in part, of one of the several causes of action set out in petitioner's Amended Complaint in the case of *Park-In Theatres Inc.*, v. *Paramount-Richards Theatres Inc. et al* listed in *Exhibit 45* and detailed in *Exhibit 46*.

Except for losses due to such film-boycott or discriminatory film-distributing practices as those leveled at petitioner's Camden Drive-In Theatre and at the drive-in theatres of some of the "independents", the operation of drive-in theatres embodying the invention of Hollingshead patent 1,909,537, have been exceptionally profitable to the owners and operators of such drive-in theatres (see Exhibits 1 to 12). In many instances the return of the investment was such that the investment was returned in its entirety in a matter of 2, 3 or 4 years and in some instances, according to reports, the investment was recouped in one year's time (see Exhibit 2).

In addition to this, the drive-in theatres have been an increasingly profitable source of revenue for the film-producers and film-distributors (see Exhibits 8 to 10 and 26).

The drive-in theatre invented by Richard M. Hollingshead, Jr. and forming the subject-matter of Hollingshead patent No. 1,909,537, was entirely unknown and unantici-

pated in the United States, or elsewhere, prior to the time when Richard M. Hollingshead, Jr. invented such drive-in theatre, and such invention by Richard M. Hollingshead, Jr., constituted an original contribution of great value and benefit to the public at large, and the public has recognized the merit of said invention by patronizing, to an ever increasing extent, the drive-in theatres of patent 1,909,537, over a thousand of which have been built, constructed and used throughout the United States, solely and directly as a result of such drive-in theatre having thus been made available to the public by Hollingshead;—all as shown by Exhibits 1 to 44, inclusive.

The drive-in theatres of the Hollingshead patent No. 1,909,537 have been of great benefit and value both to the film-producing and film-distributing branches as well as to the picture-exhibiting branch of the motion picture industry, because said drive-in theatres have increased motion-picture attendance over and above what it would have been otherwise, and the return on investment in drive-in theatres of the Hollingshead patent No. 1,909,537 has generally been substantially greater than the return on the investment in the conventional motion-picture theatre houses, and motion-picture exhibitors have profited from such use and commercial exploitation of said invention generally to an extent substantially greater than the profits which they could realize on the building and operation of conventional motion-picture theatre houses with like investments (see Exhibits 1 to 11).

Prior to the filing date of the application upon which Hollingshead patent No. 1,909,537 was issued, no motion picture theatre of any kind or construction was ever built, used or operated in the United States or in any foreign country, in which the patrons viewed the motion-picture from the seats of their own automobiles (driven into the theatre), through the windshields thereof, and, prior to such filing date, the term or phrase "drive-in theatre" was unknown and did not appear in any publication in this or any foreign country;—the term or phrase "drive-in theatre" having been coined by Richard M. Hollings-

head, Jr. (prior to said filing date) as the name for his invention which forms the subject-matter of his patent No. 1,909,537.

Patent No. 1,909,537 is the first patent ever issued in this country or in any foreign country, on a motion-picture theatre in which the patrons view the picture from the seats of their automobiles through the windshields thereof, and this patent is therefore a pioneer patent.

Prior to the decision of the U. S. Court of Appeals for the First Circuit, in the case at bar, as to which certiorari is sought, petitioner had 120 licensees under the patent here in suit, regularly paying royalties. Almost immediately upon the handing down of the aforesaid decision of the U. S. Court of Appeals for the First Circuit (on April 8, 1949) some 96 of the 120 licensees stopped paying royalties, even though the licenses do not give them the right to stop royalty-payments upon such event.

As a result, petitioner's royalty-receipts have been substantially reduced and there is now owing plaintiff substantial sums under subsisting licenses for the collection of which petitioner will be compelled to institute many suits all over the United States unless this Court resolves the questions presented by the Petition filed herein on July 6, 1949 for Writ of Certiorari. As shown by the letters of Exhibits 30 to 44, licensees would willingly pay the royalties if the patent were sustained by this Court.

Moreover, a large number of patent-infringement suits are now pending, based on Hollingshead patent 1,909,537. The proceedings in all but one* of these suits have been held in abeyance by agreement by the Court and counsel, to await the resolution, by this Court, of the questions presented by the aforesaid Petition for Writ of Certiorari, and if such Petition for Writ of Certiorari is not granted, such suits also must proceed to trial.

Affiant believes and avers that a resolution, by this Court, of the questions affecting the validity of Hollingshead Patent 1,909,537 will relieve the various courts of the burden of the large volume of litigation above in-

* *Park-In* v. *Paramount.*

dicated and hereinbelow more fully shown, because if this Court holds the Hollingshead patent valid, the royalties under the many subsisting licenses will undoubtedly be paid without contest and infringers will undoubtedly pay the reasonable royalty which petitioner has generally offered to accept in settlement of all infringement claims;—thereby also making unnecessary the further prosecution of any infringement suits. If, on the other hand, this Court were to hold Hollingshead patent invalid, petitioner would voluntarily discontinue all further patent-litigation.

There is attached hereto, as Exhibit 45, a list of patent-infringement suits instituted by petitioner (based upon Hollingshead patent 1,909,537, here in suit), showing the status of each such suit.

The building of drive-in theatres of patent 1,909,537 was impeded first (from 1933 to 1941) by the discriminatory film-distributing practices of the film-distributing organizations, who were induced to engage in such practices by their interest and investment in the *conventional* motion-picture houses and by their fear of the competition of drive-in theatres.

From 1941 to about 1946, the building of drive-in theatres was virtually at a standstill because of the war-time restrictions upon the use of building materials and equipment for non-essential purposes, and, indeed, even the *use* of the few drive-in theatres built prior to the war was materially curtailed by the war-time gasoline rationing.

It was therefore not until 1946 that the building of drive-in theatres (embodying the invention of Hollingshead patent 1,909,537) was undertaken on a large scale.

I estimate that since the end of the war about 1000 drive-in theaters have been built in the United States, largely by established motion picture exhibitors and corporations formed by motion-picture producers and film-distributors and theater chains. The number of such drive-in theaters has risen since the end of the war, to a present number of well over a thousand;—scattered from

coast to coast and from the Canadian border to the Mexican border, in every State of the Union.

The cost of building a drive-in theater ranges from about $50,000 to $400,000, and even higher, depending on size.

For this additional reason, the resolution, by this Court, of the questions presented by the Petition filed herein on July 6, 1949 for a Writ of Certiorari to the U. S. Court of Appeals for the First Circuit is of paramount importance not only to petitioner and respondent but also to an entire large industry with an estimated investment in drive-in theatres of well over $150,000,000.00 to date, and with further drive-in theaters being completed almost every week in various parts of the country;—an industry which has shown an exceptionally high profit return on such drive-in theatres, a profit return unknown in the operation of conventional motion-picture houses. Furthermore the drive-in theatre industry has escrowed or otherwise set aside, in reserve (and has taken tax-deductions for) sums of money equal to the established royalties owing to petitioner by said drive-in theatres.

The great public importance and nation-wide effect of the determination, by this Court, of the question presented by our Petition for Certiorari, is also shown by the associations of drive-in theater owners and operators, formed for the express purpose, largely, of banding together such drive-in theater owners and operators who prefer not to pay royalties under the patent here in suit and, instead, to solicit litigation-funds through such associations, to carry on litigation, in various parts of the country, against Hollingshead patent 1,909,537. By way of example I refer to Exhibits 13, 14 and 15, which are copies of news-item concerning the formation, and of Bulletin Nos. 4 & 5, of the Drive-In Theater Owners Association, Inc., of Charlotte, N. C., which is but one of several organizations aimed specifically at Hollingshead patent 1,909,537. I also refer to The Independent Drive-In Theatre Owners Association of Austin, Texas, mentioned in Exhibit 1.

I am reliably informed and therefore state, upon information and belief, that hundreds of motion-picture exhibitors, including major theatre circuits and major film-producers and film-distributing organizations as well as trade associations and trade organizations of motion picture exhibitors, including the above-mentioned newly formed organizations and associations of drive-in theatre operators, have banded together against petitioner in respect to Hollingshead patent 1,909,537 and are largely represented by the same patent-counsel, namely the firm of Fish, Richardson & Neave, who, through Hector M. Holmes, Esq. and Maxwell Barus, Esq. (both of the firm of Fish, Richardson & Neave) represent respondent, Loew's Drive-In Theatres Inc. and other defendants in other pending suits and who also represent the principal trade-associations of drive-in theater operators banded together against Hollingshead patent 1,909,537, as shown by Exhibit 14, and who are cooperating with other counsel representing still other infringers involved in litigation with petitioner, as shown by Exhibits 21 and 46.

As shown by *Exhibits 13 to 44*, inclusive, the drive-in theatre industry as a whole, has viewed the action at bar as the *test case*, and, I believe, substantial sections of the motion-picture exhibition industry, and the trade associations above referred to, have contributed financially to the defense of the suit at bar. Thus, while Loew's Drive-In Theaters Inc. is the nominal respondent at bar, a substantial part of the motion-picture industry, if not, indeed, the whole motion-picture exhibition industry is vitally concerned in the *early* determination of the validity of the Hollingshead patent 1,909,537 by this Court.

Exhibits 30 to 44, inclusive, are copies of letters received by petitioner or by petitioner's attorneys, from petitioner's licensees (or from the latter's attorneys);—Exhibits 30 to 42 being letters received between the decision of the U. S. Court of Appeals for the First Circuit in the case at bar and the denial by this Court (on October 10, 1949) of the petition for writ of certiorari, while Exhibits 43 and 44 were received since such denial.

The licensee[1] whose letter of October 17, 1949 is Exhibit 43, paid $169,967.95 in royalties to petitioner during the period from 1940 to 1949, for which such licensee[1] has made formal demand for refund since this Court's denial (on October 10, 1949) of the petition for writ of certiorari, in the case at bar, as shown by the licensee's aforesaid letter. Other licensees have made similar demands for the refund of royalties heretofore paid, as shown by Exhibits 30, 32 and 35. Exhibits 30, 32, 35 and 43 indicate another line of extensive and widespread potential litigation[2], namely ex-licensees' claims of royalty-refunds in the event that the patent is finally determined to be invalid.

I am personally acquainted with most of petitioner's many licensees (and former licensees) under the patent here in suit, as well as with many of the other drive-in theatre owners and operators throughout the United States, and I have conferred with many of them throughout the United States in respect to the decision of the U. S. Court of Appeals for the First Circuit in the case at bar, and based upon my knowledge of the drive-in theatre industry, I state that the industry is looking to the case at bar and to this Court's decision upon the merits of the case at bar, as the test case in respect to the validity of Hollingshead patent 1,909,537.

This is confirmed by the many public statements (in trade publications) by some of the representatives and by some of the leaders of the drive-in theatre industry, as shown by Exhibits 16, 17, 18, 20, 22, 23, 24, 25, 26, 27, 28 and 29, attached hereto, and is also confirmed by the letters hereto attached as Exhibits 30 to 44, inclusive, which are representative of and fairly reflect the general attitude of the entire drive-in theatre industry, namely, that the industry is perfectly willing to pay the established royalty if this Court should grant a writ of certiorari in

[1] originally Underwood & Ezell (a partnership) and later Claude Ezell & Associates, Inc.

[2] in addition to the hundreds of patent-infringement suits and the royalty-collection suits which would have to be instituted by petitioner if certiorari is not granted in the case at bar

this case and, upon a consideration of the merits of the case, hold the Hollingshead patent valid.

Conversely, if upon a consideration of the merits of this case, this Court should hold the Hollingshead patent invalid, petitioner will discontinue all patent-infringement suits.

The denial of this petition for re-hearing and of the petition for writ of certiorari will, as indicated by Exhibits 30 to 44, inclusive, necessarily result not only in extensive further patent litigation but also in extensive litigation rising out of the many license agreements issued by petitioner, on which royalty-payments have been suspended.

The granting of petition for writ of certiorari and the final adjudication of the validity of the Hollingshead patent 1,909,537 will render most, if not all such litigation unnecessary and will represent a great convenience and economy not only to the many licensed and unlicensed drive-in theatre owners and operators but also to the many Federal Courts which would be involved in such litigation, because, if the patent is held valid, then (as indicated by Exhibits 30, 31, 32, 33, 34, 35, 36, 38, 39, 40 & 42) users of the invention of the patent will willingly (and without litigation) pay the established royalties due petitioner for its use, which use has been very profitable to both the licensed and unlicensed users of this invention, as indicated by Exhibits 1 to 11, inclusive.

I am advised and believe that, upon the merits, this Court would hold Hollingshead patent 1,909,537 valid, as (I am advised) that such holding would be consonant with the facts and the applicable law, as found and concluded (*favorably to petitioner*) by the trial court.

(signed) WILLIS WARREN SMITH

Affirmed and subscribed before me, a notary public in and for the State and County aforesaid, on this 8th day of November, 1949.

(signed) E. K. MOEDERN

[SEAL] Notary Public

My Commission Expires January 4, 1953

IN THE SUPREME COURT OF THE UNITED STATES

Park-In Theatres, Inc.
plaintiff-petitioner

v.

Loew's Drive-In Theatres, Inc.
defendant-respondent

No. 170
October Term, 1949

Affidavit of Robert McCay Green in support of Petition for Re-Hearing

Commonwealth of Pennsylvania }
County of Philadelphia } *ss*

I, Robert McCay Green, being duly sworn, depose and say:

I am a citizen of the United States and of the Commonwealth of Pennsylvania, residing at 19th and Walnut Streets, Philadelphia, Pa.

I am attorney-at-law, a member of the bar of the Supreme Court of Pennsylvania, have actively engaged in the practice of law for the past 20 years, and I am a member of the law-firm of Paxson, Kalish, Dilworth & Green, general counsel for petitioner.

Exhibits 33, 34, 36, 37, 38, 39, 40, 41 and 42, hereto attached, are copies of letters received by me within mailing-time after the respective dates appearing thereon.* Most of these letters were received in reply to letters which I wrote to certain of petitioner's licensees, demanding payment of royalties due under their respective license-agreements under Hollingshead patent 1,909,537.

All emphasis applied in the hereto attached copies of these letters have been supplied by me, and all foot-

* the day of the month having been absent on the letter of Exhibit 39, but this letter was received some time in August of 1949

notes applied to the hereto attached copies of these letters have also been supplied by me and represent my interpolations.

As shown by the aforementioned Exhibits, as well as by the other letters which are Exhibits 30, 31, 32, 43 and 44, identified in the accompanying Affidavit of W. W. Smith bearing even date herewith, and as shown by the many trade publications of Exhibits 14 to 29, inclusive, also identified in said Smith Affidavit, the case at bar is of great importance to an entire large industry, and, as also indicated by the list of suits hereto attached as Exhibit 45, the granting of a Writ of Certiorari in the case at bar and the consequent early determination, by this Court, of the validity of Hollingshead patent 1,909,537, will be a great convenience and economy not only to the many hundreds of owners and operators of drive-in theatres embodying the construction covered by Hollingshead patent 1,909,537, but will also be a great convenience and economy to the many Federal Courts which otherwise will inevitably be involved for many years in time-consuming and costly litigation.

As shown by the letters hereto attached (which, I believe, represent a fair reflection of the general attitude of the drive-in theatre industry), if this Court sustains validity of Hollingshead patent 1,909,537, the industry as a whole will willingly pay the established royalty rate for the use of the invention of said patent, without any further litigation. If, on the other hand, this Court, after hearing and considering this case upon the merits, should hold the Hollingshead patent invalid, petitioner will withdraw all now-pending patent-infringement suits and will not institute the many other new patent-infringement suits which it would have to institute against the many infringers of this patent, in the event that Writ of Certiorari is not granted in the case at bar. Thus, if Writ of Certiorari is not granted in the case at bar, petitioner will have to institute several hundred patent-infringement suits in order to stay the running of the statute of limitations, pending the re-litigation of the Hollingshead patent

in some other Circuit. I estimate it will require anywhere from three to five years before a decision of another U. S. Circuit Court of Appeals can be obtained in any of the now-pending patent infringement suits listed in Exhibit 45 hereto attached. I base this estimate upon the various amounts of time consumed, for the various stages of the case at bar, both in the District Court and in the U. S. Court of Appeals for the First Circuit, as shown in the date-line directly beneath the headings of columns 11 to 29, inclusive, in the folding *Chart* annexed to petitioner's *Brief*, filed in this Court on July 6, 1949, *in Support of the Petition for Writ of Certiorari.* I also base this estimate upon the case of *Park-In Theatres, Inc.* v. *Paramount-Richards Theatres, Inc. et al*, pending for the last two years in the U. S. District Court for the District of Delaware, in which that District Court has already been called upon to devote many full days to hearings on defendants' various motions and to the decisions on said motions, *all before any answer filed;*—the last six of defendants' many motions having been argued, for a full day, on October 31, 1949. I attach hereto as Exhibit 46 a descriptive list of the papers filed, hearings had and decisions rendered in the aforesaid case of *Park-In Theatres, Inc.* v. *Paramount-Richards Theatres, Inc. et al.* While proceedings in most of the other suits have been suspended to await the outcome of this Court's decision in the case at bar, as indicated in Exhibit 45 hereto attached, some suits such as, for instance, *Park-In Theatres, Inc.* v. *Lone Star Theatres, Inc.* (listed in Exhibit 45) have already gone through several stages of motions, hearings and decisions thereon, before further proceedings were suspended to await a final determination in the case at bar.

Therefore, in view of the length of time which is inevitably required before a decision of the Court of Appeals of another Circuit can be obtained, many more suits will have to be filed if Writ of Certiorari is not granted in the case at bar. This will result in the expenditure of countless time and expense, for both the courts and the

industry, all of which can be saved if this Court grants certiorari, because it is clear that both the industry and the patent-owner will accept only this Court's decision, as a final determination of the validity of this patent which is the basic question involved in this widespread litigation.*

Further deponent sayeth not.

(signed) ROBERT MCCAY GREEN

Sworn to and subscribed before me this 8th day of November, 1949.

(signed) E. K. MOEDERN
Notary Public
My Commission Expires January 4, 1953

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* See the opinion rendered by respondent's chief counsel (Hector M. Holmes, Esq.) to the *Drive-In Theatres Owners, Inc.*, quoted in the latter's *Bulletin No. 4* (Exhibit 14):

"The U. S. Supreme Court might consent to review the decision of the appellate court if asked to do so . . . its decision would then become the binding one"
". . . everyone . . . is subject to the law as determined in the case of . . . the U. S. Supreme Court".

See also the letters which are Exhibits 30, 31, 32, 33, 34, 35, 36, 38 and 40, in which petitioner's licensees state their complete willingness to pay all now-unpaid royalties, without any controversy whatever, if this Court were to sustain Hollingshead patent 1,909,537.